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**IN THE UNITED STATES DISTRICT COURT
 FOR THE DISTRICT OF ARIZONA**

Richard and Maria Shupe,

 Plaintiffs,

 v.

 Bank of America, N.A.,

 Defendant.

No. CV 13-00019-JGZ-JR

**BANK OF AMERICA,
 N.A.’S MOTION FOR
 SUMMARY JUDGMENT**

(Hon. Jacqueline Rateau)

The Court should enter summary judgment for Defendant Bank of America, N.A. (“BANA”) because Plaintiffs Richard and Maria Shupe (the “Shupes”) cannot prove the elements of any cause of action. The Shupes lack valid evidence that BANA made each of the alleged calls, nor have they provided support for their claim that any of the calls were made for telemarketing purposes. There is no material evidence against BANA in this case, and the Court should enter summary judgment for BANA.

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTS

A. Shupes’ Multiple Lawsuits.

The Shupes are have filed several lawsuits in both federal and state court, including several involving telemarketing claims. [Statement of Facts (“SOF”), at ¶ 2] In fact, a

1 defendant in a telemarketing-related matter in the Pima County Superior Court recently
 2 filed a motion seeking to declare them vexatious litigants. [SOF, at ¶ 1]

3 **B. Background.**

4 The Shupes obtained a mortgage loan from BANA in 2010 to purchase their current
 5 residence, 3657 Double Echo Road, Tucson, Arizona. [SOF, at ¶ 3] The Shupes currently
 6 have a credit card with BANA. [SOF, at ¶ 4]

7 In 2006, a third party—who is not a named party in this action—applied for and
 8 received a mortgage from BANA. [SOF, at ¶ 4] On his loan application, he listed the
 9 telephone number 520-578-6400 as his work contact number. [SOF, at ¶ 4] This third party
 10 later fell behind on his loan payments and defaulted on his loan. [SOF, at ¶ 5] During
 11 2011, BANA attempted to contact this third-party in an effort to discuss programs that may
 12 have been available to prevent foreclosure. [SOF, at ¶ 5] The Shupes acquired the number
 13 520-578-6400 sometime in 2010. [SOF, at ¶ 6] However, BANA was never informed by
 14 the third party that this number was no longer his work contact number. [SOF, at ¶ 5]
 15 Thus, in its efforts to contact this third party, BANA attempted to contact him via the
 16 phone numbers he had provided to the bank, including 520-578-6400. [SOF, at ¶ 5]

17 The Shupes claim BANA made 56 calls to their residential phone number—520-
 18 578-6400—from August to November 2011 in violation of the Telephone Consumer
 19 Protection Act (“TCPA”). To support this claim, the Shupes have produced caller-ID
 20 images of these 56 calls. [SOF, at ¶ 7] However, they have produced no phone records or
 21 other call logs to authenticate the calls. BANA has confirmed that it made only 48 of these
 22 calls, and that it did so in an effort to contact the third-party borrower to discuss programs
 23 he may be eligible for to avoid foreclosure. [SOF, at ¶ 8] BANA’s attempts to contact this
 24 third party were made in its efforts to comply with A.R.S. § 33-807.01. [SOF, at ¶ 8]

25 **II. LEGAL STANDARD**

26 The Shupes bear the burden of pointing to “specific facts showing a genuine issue
 27 for trial.” Fed. R. Civ. P. 56(e)(2). Summary judgment should be granted where there is
 28 “no genuine issue as to any material fact and that the movant is entitled to judgment as a

1 matter of law.” Fed. R. Civ. P. 56(c). “Rule 56(c) mandates entry of summary judgment,
 2 after adequate time for discovery and upon motion, against a party who fails to make a
 3 showing sufficient to establish the existence of an element essential to that party’s case,
 4 and on which that party will bear the burden of proof at trial.” Celotex Corp. v. Catrett,
 5 477 U.S. 317, 324 (1986) (affirming summary judgment against plaintiff who failed to
 6 produce evidence supporting wrongful death claim).

7 “Furthermore, the party opposing summary judgment ‘may not rest upon the mere
 8 allegations or denials of [the party’s] pleading, but . . . must set forth specific facts
 9 showing that there is a genuine issue for trial.’” Juarez v. CC Servs., Inc., 434 F. Supp. 2d
 10 755, 758 (D. Ariz. 2006) (quoting Fed. R. Civ. P. 56(e)). “There is no issue for trial unless
 11 there is sufficient evidence favoring the non-moving party; if the evidence is merely
 12 colorable, or is not significantly probative, summary judgment may be granted.” Id.
 13 (internal quotations and citation omitted).

14 **III. ARGUMENT**

15 In their Complaint, the Shupes brought claims for (1) Violation of the TCPA (47
 16 U.S.C. § 227); (2) Violation of A.R.S. § 44-1282; (3) and Invasion of Privacy.¹ Each of
 17 their three claims is based on alleged telemarketing calls they allege BANA made over the
 18 period of August to November 2011. However, BANA’s records show that these calls
 19 were not made to market any good or services to them, and the Shupes have not provided
 20 any evidence to the contrary. [SOF, at ¶ 9] Further, the Shupes have not provided any
 21 evidence the calls were made using “an artificial or prerecorded voice.” The fact is BANA
 22 made the calls in an effort to contact a third-party borrower to discuss programs that may
 23 have been available to avoid foreclosure, communications that are required by Arizona law
 24 prior to noticing a trustee’s sale. [SOF, at ¶ 8] Thus, the Shupes have failed to produce
 25 evidence to support their TCPA claim, and BANA is entitled to summary judgment on
 26

27 ¹ The Complaint originally included additional claims for harassment and
 28 intentional infliction of emotional/physical distress. However, on March 4, 2013, the
 Shupes filed notice that they had withdrawn those claims. [Doc. 19]

1 their first and second causes of action. Further, the Shupes have failed to produce evidence
 2 supporting their invasion of privacy claim, and summary judgment in BANA's favor is
 3 appropriate as to their third claim, as well. Because their state law claim is also based on a
 4 violation of the TCPA, their second cause of action also fails.

5 **A. The Court Should Enter Summary Judgment On The Shupes' TCPA**
 6 **Claim.**

7 The Shupes' TCPA claim is based, in part, on their allegation that BANA (1) used
 8 "auto/predictive dialing systems" to call their residential phone line, and (2) "ignored
 9 Plaintiff's [sic] notice to cease communications." The Shupes have provided no evidence
 10 that the calls at issue fall within the TCPA.

11 **1. The TCPA Does Not Apply To The Calls At Issue Here, As They**
 12 **Were Not Made Using "An Artificial Or Prerecorded Voice."**

13 When the telephone number that is the subject of a TCPA claim is a residential
 14 telephone line, the TCPA only prohibits calls when they are made "using an artificial or
 15 prerecorded voice to deliver a message. . . ." 47 U.S.C. § 227(b)(1)(B) ("It shall be
 16 unlawful for any person within the United States . . . to initiate any telephone call to any
 17 residential telephone line using an artificial or prerecorded voice to deliver a message. . .
 18 ."). But the Shupes have never alleged the calls were made using an artificial or
 19 prerecorded voice, only that "auto/predictive dialing systems" were used. In fact, Plaintiff
 20 Richard Shupe alleges he spoke with BANA representatives. [SOF, at ¶ 10] Further,
 21 BANA's records suggest no call ever resulted in a connection or a conversation. [SOF, at ¶
 22 11] Only three calls indicated a duration that a connection was in even possible—though
 23 still unlikely—they were likely not long enough for a BANA representative to describe the
 24 purpose of the call, let alone attempt to market a product or service. [SOF, at ¶ 11] While
 25 BANA disputes that its representatives ever spoke to anyone at the Shupes' number, the
 26 fact is the Shupes have never even alleged BANA used prerecorded or artificial voices,
 27 which is required to state a claim under the TCPA when the number at issue is a residential
 28 line.

1 Indeed, the calls originated from BANA's Mortgage Loss Mitigation department for
2 the purposes of discussing—with the third-party borrower, not the Shupes—the
3 availability of programs that may have been available to avoid foreclosure of that
4 borrower's property. [SOF, at ¶ 8] BANA only uses live callers for such calls, and does not
5 use prerecorded or artificial voices with the phone number the calls allegedly originated
6 from: 1-800-669-0102. [SOF, at ¶ 12] These calls require a live caller, as the programs
7 available to a borrower depend on the unique circumstances of each loan. [SOF, at ¶ 13]
8 BANA simply could not have conducted these calls using an artificial or prerecorded
9 voice.

10 The TCPA only prohibits calls solely on the basis of “auto/predictive dialing
11 systems” when they are made to a cellular phone, and the Shupes have clearly stated the
12 number at issue is their residential telephone line. Thus, the Shupes cannot successfully
13 allege a TCPA claim given the contents of their Complaint and the evidence they have
14 produced.

15 **2. The Shupes' TCPA Claim Fails Because The Calls Were Not**
16 **Telemarketing Calls.**

17 The calls at issue did not violate the TCPA because they were not telemarketing
18 calls. The TCPA was enacted for the express purpose of protecting the public from
19 aggressive telemarketers, which is not the type of conduct alleged here. Under the TCPA,
20 the term “telephone solicitation” means “initiation of a telephone call or message for the
21 purpose of encouraging the purchase or rental of, or investment in, property, goods, or
22 services[.]” 47 U.S.C. § 227(a)(4). The FCC has created an exemption for a call “made for
23 a commercial purpose but does not include or introduce an unsolicited advertisement or
24 constitute a telephone solicitation.” 47 C.F.R. § 64.1200(a)(2)(iii). Other than through mere
25 speculation and unfounded assumptions, the Shupes cannot dispute that the calls were not
26 made for marketing purposes. BANA did not make any calls to the Shupes “to encourage
27 them to purchase, rent, or invest in any property, goods, or services,” and the Shupes have
28 not provided evidence to show otherwise.

1 Rather, BANA made the calls to discuss foreclosure alternatives, including potential
2 loan modification, with the third-party borrower. [SOF, at ¶ 8] In fact, it was required to do
3 so under A.R.S. § 33-807.01. In 2012, the FCC acknowledged that loan servicers were
4 required to contact some borrowers to offer home loan modifications and refinancing in
5 order to comply with the American Recovery and Reinvestment Act, which established
6 certain outreach requirements for lenders in an effort to prevent foreclosures. See 12
7 U.S.C.A. ¶ 5201 et seq. Similarly, A.R.S. § 33-807.01 contains a similar requirement,
8 compelling loan servicers to contact borrowers regarding foreclosure alternatives before
9 noticing a trustee's sale. The FCC concluded that calls made by a loan servicer for the
10 purpose of discussing loan modification and refinance issues "are not solicitation calls and
11 do not introduce an unsolicited advertisement." In the Matter of Rules & Regulations
12 Implementing the Tel. Consumer Prot. Act of 1991, 27 F.C.C.R. 1830, 1841 ¶ 28 (2012).
13 Here, BANA attempted to contact the third-party borrower to discuss foreclosure
14 alternatives, as it was required to do before conducting a trustee's sale, and its efforts to
15 contact that borrower were not solicitation calls and did not introduce any unsolicited
16 advertisement.

17 Further, the FCC has explicitly stated calls related to debt collection will be
18 "covered by exemptions . . . for commercial calls which do not transmit an unsolicited
19 advertisement." In the Matter of Rules & Regulations Implementing the Tel. Consumer
20 Prot. Act of 1991, 7 F.C.C.R. 8752, 8772, ¶ 39 (1992). In 2008, the FCC again confirmed
21 that "'calls solely for the purpose of debt collection are not telephone solicitations . . . ' and
22 'calls regarding debt collection ... are not subject to the TCPA's separate restrictions on
23 'telephone solicitations.' " See Meadows v. Franklin Collection Serv., Inc., 414 Fed. App'x
24 230, 236 (11th Cir. 2011) (citing In Re Rules and Regulations Implementing the TCPA of
25 1991, 23 F.C.C.R. 559, 565, ¶ 11 (2008)). Here, BANA initiated the calls regarding the
26 debt owed by the third-party borrower; they were not made to transmit an unsolicited
27 advertisement.

The calls at issue originated from BANA's Mortgage Loss Mitigation department, which is tasked with calling borrowers who have fallen behind on their mortgage to discuss loan modification programs and foreclosure alternatives. [SOF, at ¶ 15] BANA does not conduct telemarketing campaigns from this number. [SOF, at ¶ 15] The Shupes have not produced any evidence to support their claim that the calls at issue were telemarketing calls. On the contrary, BANA's records indicate the calls were initiated in an attempt to discuss foreclosure alternatives with the third-party borrower, as it was required to do prior to foreclosure. Without evidence to support their claim that the calls were telemarketing calls, they are not subject to the TCPA.

B. The Court Should Enter Summary Judgment On The Shupes' Claims Under Arizona's Telemarketing Statute.

Arizona's telemarketing law, which prohibits solicitors to initiate telephone calls to numbers entered in the national do-not-call registry, expressly allows calls "that would be permitted by federal law or regulation relating to interstate telephone solicitation." A.R.S. §44-1282 (A) & (B). Thus, if the Shupes' TCPA claim fails, their claim under the Arizona statute automatically does. Further, the Arizona law applies only to *intrastate* calls, but the Shupes have not offered evidence to support that the calls originated from within the state. For either reason, or both, the Arizona claim should be dismissed.

C. The Court Should Enter Summary Judgment On The Shupes' Invasion of Privacy Claim.

Under Arizona law, "[i]n order to constitute an invasion of the right of privacy, an act must be of such a nature as a reasonable man can see might and probably would cause mental distress and injury to anyone possessed of ordinary feelings and intelligence, situated in like circumstances as the complainant; and this question is to some extent one of law." Reed v. Real Detective Publishing Co., 63 Ariz. 294, 305, 162 P.2d 133, 139 (1945) (citation omitted).

The Arizona Supreme Court has recognized the invasion of privacy torts laid out in the Restatement (Second) of Torts §§ 652A et seq., which include the tort of intrusion upon seclusion, see Godbehere v. Phoenix Newspapers, Inc., 162 Ariz. 335, 338 (1989), and at

1 least one Arizona Court of Appeals decision has applied the tort of intrusion upon
 2 seclusion. See Hart v. Seven Resorts Inc., 190 Ariz. 272, 279 (Ct.App.1997). Arizona
 3 courts generally follow the Restatement in the absence of Arizona authority on an issue.
 4 Reed, 63 Ariz. at 306; Campbell v. Westdahl, 148 Ariz. 432 (Ct. App. 1985).

5 The Restatement suggests the tort of invasion of privacy by an unreasonable
 6 intrusion upon the seclusion of another is not likely to include telephone calls such as those
 7 at issue here. In general, the tort involves an “interference with the interest of the individual
 8 in leading, to some reasonable extent, a secluded and private life, free from the prying eyes,
 9 ears and publications of others.” Restatement (Second) of Torts § 652A, cmt. b. The
 10 Restatement describes the tort as follows:

11 The invasion may be by physical intrusion into a place in which the
 12 plaintiff has secluded himself, as when the defendant forces his way into the
 13 plaintiff’s room in a hotel or insists over the plaintiff’s objection in entering
 14 his home. It may also be by the use of the defendant’s senses, with or
 15 without mechanical aids, to oversee or overhear the plaintiff’s private affairs,
 16 as by looking into his upstairs windows with binoculars or tapping his
 17 telephone wires. It may be by some other form of investigation or
 18 examination into his private concerns, as by opening his private and personal
 19 mail, searching his safe or his wallet, examining his private bank account, or
 20 compelling him by a forged court order to permit an inspection of his
 21 personal documents. The intrusion itself makes the defendant subject to
 22 liability, even though there is no publication or other use of any kind of the
 23 photograph or information outlined.

24 Restatement (Second) of Torts, § 652B. However, the Shupes’ claims and the evidence
 25 provided to support them do not involve this situation. Therefore, this Court should grant
 26 summary judgment in BANA’s favor.

27 **Relief Requested**

28 Because the Shupes have failed to produce evidence to support any of their three
 claims, this Court should grant summary judgment on all three claims in BANA’s favor.
 BANA also requests that, should the Court grant the Shupes’ request to extend discovery
 [Doc. 118] or to stay the proceedings [Doc. 117], it be permitted to amend this motion, as

1 additional discovery time may reveal more evidence relevant to this motion and BANA's
2 defenses.

3 RESPECTFULLY SUBMITTED this 10th day of July, 2014.

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